is accordingly rested on some other theory. It is hard to see how the mere indirectness of the methods used has any significance *per se*. That may, however, be a strong indication that the defendant's predominant state of mind is vindictive, which, as above suggested, should turn the balance against him.[11] The less direct a boycott is, the less likely it is to be effective,[12] and if, for instance, the present scheme is not calculated to reach A., D. might well claim an injunction on the ground that he was being injured from mere spite. But no such claim could here be made, for A. is complaining because the method adopted is too effective.

Any discussion of legislation aiming at the legality of the secondary boycott must not overlook the fact that psychologically the principle that intentional injury is *primâ facie* actionable bears peculiarly hard on the defendant. It concentrates attention on the plaintiff's wrong and makes it a matter of secondary consideration what overt act the defendant has done. The defendant may still justify, but he must convince a mind that has approached the problem from a starting point unfavorable to him. Furthermore, it is scarcely possible to deny that combinations of workmen have been treated more severely by the courts than combinations of traders or employers.[13] This is unjustifiable theoretically, and the advantage that waiting power generally gives capital in competition with labor does not render it more defensible practically. If the law is not to assume closer supervision over the incidents of the industrial struggle through compulsory arbitration, to equalize the contest by withholding legal or equitable actions which in practice are chiefly serviceable to one side only seems most in consonance with the underlying spirit of the common law.

THE DOCTRINE OF THE PRESUMPTION OF A LOST GRANT AS APPLIED AGAINST THE STATE. — In a suit in equity to confirm title, brought by a grantee from the state under a 1907 patent, the Supreme Court of Mississippi recently held that a grant from the state to the defendant would be presumed from the latter's peaceful and uninterrupted possession for over twenty years. *Caruth* v. *Gillespie*, 68 So. 927 (Miss.).[1] The

Lindsay & Co., Ltd. *v.* Mont. Fed. of Labor, 37 Mont. 264, 273, 96 Pac. 127, 130; Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 598, 616; Sweeney *v.* Coote, [1906] 1 Ir. Ch. 51, 109.

[11] The vindictive nature of the action in some cases has amply warranted enjoining it. Quinn *v.* Leathem, [1901] A. C. 495; Miller *v.* Collet, 32 New Zealand L. R. 994; Martell *v.* Victorian Coal Miners' Ass'n, 25 Australian L. T. 40, 120. Cases are also to be distinguished where breach of contract is induced. Temperton *v.* Russel, [1893] 1 Q. B. 715; Doremus *v.* Hennessy, 176 Ill. 608, 52 N. E. 924; Jackson *v.* Stonfield, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14. See New Jersey Ptg. Co. *v.* Cassidy, 63 N. J. Eq. 759, 763, 53 Atl. 230, 232. Violence is of course out of the question. Beck *v.* Ry. Teamsters' Union, 118 Mich. 497, 77 N. W. 13. And fining one not affiliated with the defendants must generally be illegal. March *v.* Bricklayers', etc. Union, 63 Atl. 291, 79 Conn. 7.

[12] See MITCHELL, ORGANIZED LABOR, 289.

[13] See Lewis in 44 AM. L. REG. (n. s.) 491–492; "Report of Commission on Industrial Relations," 135, 383; 28 HARV. L. REV. 697, n. 5.

[1] A more complete statement of the facts of this case will be found on p. 106 of this number.

law seems tolerably clear that the doctrine of the presumption of a lost grant will operate against the state as against an individual, even where the state is a party to the action.[2] This is certainly true where, as in the principal case, the state is not itself bringing any action,[3] and the two classes of cases would appear indistinguishable, since in the principal case, for instance, it is necessarily adjudicated that the state had in 1907 no title which it could grant to the plaintiff. On the other hand, there is no doubt that where the Statute of Limitations is concerned, in a case of admittedly adverse possession, the old maxim of *nullum tempus occurrit regi* prevails and the state cannot be barred.[4] At first sight it seems strange that the doctrine of the presumption of a lost grant should operate against the state, while the Statute of Limitations cannot, for in almost all other circumstances the lost-grant doctrine and the operation of the statute are governed by similar principles and produce precisely similar results.

The doctrine of the presumption of a lost grant was developed by the courts to remedy the situation where incorporeal hereditaments, to which the statutes of limitation did not apply, had been enjoyed for a long period of time without interruption.[5] Like so many novel doctrines of the law, it had its inception in the fictional form of a so-called presumption of fact to be weighed by the jury under direction.[6] It rapidly developed into a true presumption of law — a rule which, under given conditions, bound the jury to a given verdict. And finally in 1881 the fiction was wholly discarded in England by the House of Lords and the presumption held to be no presumption at all but a positive rule of substantive law.[7] This last step has also been taken by the majority of the courts in this country.[8] Moreover, the doctrine of the presumption of a lost grant has generally been applied in its variations by strict

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[2] United States *v.* Chavez, 175 U. S. 509. In State *v.* Dickinson, 129 Mich. 221, 88 N. W. 621, the court intimated that the presumption might not apply without corroborating circumstances, such as the loss of many documents in the neighborhood.

[3] Reed *v.* Earnhart, 10 Ired. (N. C.) 516; Matthews *v.* Burton, 17 Gratt. (Va.) 312; Crooker *v.* Pendleton, 23 Me. 339. In the latter case it is again suggested that some slight corroborating evidence may be necessary to raise the presumption.

[4] United States *v.* Hoar, 2 Mason (U. S.) 311; Lindsey *v.* Miller's Lessees, 6 Pet. (U. S.) 666. See WOOD, LIMITATIONS, 3 ed., § 52; 15 HARV. L. REV. 146. The doctrine is based on the old notion that laches can never be attributed to the crown. See CO. LIT. 57 *b*. Its basis in reason is that the state is less qualified to act promptly than an individual. There is the further more modern consideration that the people should not be deprived of their property through the carelessness of state officials.

[5] Perhaps the clearest account of the development of this doctrine is to be found in the opinion of Cockburn, C. J., in Angus *v.* Dalton, 3 Q. B. D. 85, 103, showing how it arose to supplement the Statute of Limitations and then followed step by step the analogy of the various statutes — changing its period with theirs from the indefinite limit beyond the memory of man to the twenty years finally established by the Statute of 21 JAC. I, c. 16. See also 2 TIFFANY, REAL PROPERTY, § 445.

[6] See J. B. Thayer in 3 HARV. L. REV. 141, 149.

[7] Dalton *v.* Angus, L. R. 6 App. Cas. 740.

[8] Tyler *v.* Wilkinson, 4 Mason (U. S.) 397, 402; Ward *v.* Warren, 82 N. Y. 265; Lehigh Valley R. R. *v.* McFarlan, 43 N. J. L. 605; Carmody *v.* Mulrooney, 87 Wis. 552. See 2 GREENLEAF, EVIDENCE, 16 ed., § 539. Two North Carolina cases in successive years are worthy of close study in order to see how even in one year the court practically crossed the line between a real presumption and a rule of substantive law. Reed *v.* Earnhart, 10 Ired. (N. C.) 516; Bullard *v.* Barksdale, 11 Ired. (N. C.) 461. See also 2 WASHBURN, REAL PROPERTY, 6 ed., § 1250.

analogy to the rules governing the acquisition of title by adverse possession under the Statute of Limitations, although reaching a result inconsistent with its own logical origin.[9] The final point of similarity between the two doctrines is that fundamentally the same notion of public policy is responsible for them both — that long-continued peaceful enjoyment of real property rights should not be disturbed.[10]

But although the doctrine of the presumption of a lost grant has developed along exactly the same lines that govern the operation of the Statute of Limitations and has in substance merely supplemented the Statute in the case of incorporeal hereditaments, it may have retained its original function as a true presumption when applied to corporeal hereditaments.[11] At all events, it is applied against the state as a true presumption.[12] The state, in other words, may always rebut the presumption arising from undisturbed possession and show that the claimant actually never had title. Thus regarded, there is no reason why it should not apply against the state as against an individual.[13] It is a very different matter from absolutely divesting the state of its title by the Statute of Limitations, for an opportunity of curing the negligence of the state officials in bringing no action for twenty years is afforded by allowing the state to prove that as a matter of fact the claimant never had any real title. Moreover, as a rule of procedure merely, the lost-grant doctrine has a basis of reason, without being subject to criticism as judicial legislation. Long continued adverse possession raises a fair inference that the alleged owner would have brought an action if he had a right to do so, which may properly cast the burden on the

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[9] Perhaps the best example of this is found in the cases where during the use of the land or the easements the owner has been under some disability, such as infancy or insanity. The majority of cases hold that this period of disability cannot be subtracted from the time of enjoyment, on the analogy of the interpretation of the Statute of Limitations. Tracy *v.* Atherton, 36 Vt. 503; Wallace *v.* Fletcher, 30 N. H. 434. But see *contra*, Lamb *v.* Crosland, 4 Rich. (S. C.) 536. Yet the disability shows clearly that the failure of the owner to interrupt was not due to his having no right to do so, and thus upsets completely the logical basis of the presumption.

[10] See Story, J., in Ricard *v.* Williams, 7 Wheat. (U. S.) 59, 109. "Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions." Sentences of this sort can be found in almost every opinion dealing with either doctrine.

[11] It is impossible to determine this definitely one way or the other from the authorities, since all such cases would be decided simply under the Statute of Limitations. The only occasion when the question would be likely to arise is where the state is a party, and, as will be seen, the presumption is then treated as a true presumption anyway, for another reason, — namely, that the state is a party. It is conceivable that the question might also arise where the full statutory period had not yet run in the case of corporeal hereditaments. See Crooker *v.* Pendleton, *supra*, 23 Me. 339, 342; 4 WIGMORE, EVIDENCE, § 2522. But in such a case the presumption would also of necessity have to be treated as a true one.

[12] This may be seen from a careful consideration of the principal Mississippi case and from the cases cited in notes 2 and 3, *supra*. But see note 15, *infra*. Moreover, it was definitely held in *Crane* v. *Reeder*, 21 Mich. 24, 77, that the presumption would not arise where other facts clearly showed that there was no title behind the long possession.

[13] This point was again elaborately decided by the Circuit Court of Appeals last June in the case of the presumption of payment. Chesapeake & Delaware Canal Co. *v.* United States, 223 Fed. 926.

claimant to show that there was in fact no grant.[14] The only difficulty in thus applying the doctrine as a true presumption, when the state is involved, is that for all other purposes it is treated as a conclusive rule of substantive law, and that it has become quite unnatural to regard it as anything else.[15]

MAY THE LEGISLATURE, WITHOUT JUDICIAL REVIEW, PREVENT A REFERENDUM BY DECLARING ITS ACT WITHIN THE EMERGENCY EXCEPTION? — The frequent conflict between the judicial and legislative branches of government has been interestingly presented by a series of cases in Washington, all involving the same question in slightly different phases.[1] A recent amendment to the Washington constitution provided that no bills should take effect for ninety days, thereby giving an opportunity for a referendum, but excepting bills for certain emergency purposes from the operation of this provision.[2] Can the legislature conclusively determine that a bill falls within this exception, or is its determination subject to judicial review? The Washington court exercised a power to review; other courts dealing with substantially similar provisions have differed as to the answer.[3]

Really two closely related questions are involved. Is it a political question to determine whether a bill properly falls within the exception? Was it the intent of the people to vest the ultimate power as to this exception in the legislature or in the judiciary? If it is a political

[14] See 2 GREENLEAF, EVIDENCE, 16 ed., § 539 *a*. Where the owner has only a future estate the trespasser gets no easement if he does not injure the *corpus* of the estate. Wheaton *v.* Maple & Co., L. R. (1893) 3 Ch. 48. On the same reasoning no prescriptive right to ancient lights has been recognized in this country since it would be absurd to argue that because a man does not build a wall against his neighbor's house he has no right to do so. Parker *v.* Foote, 19 Wend. (N. Y.) 308.

[15] See Reed *v.* Earnhart, 10 Ired. (N. C.) 516, 518, *supra* n. 3, where the court, while actually applying the presumption of a lost grant against the state, admits that it "is not based upon the idea that one actually issued, but because public policy and 'the quieting of titles' make it necessary to act upon that presumption." Likewise in Matthews *v.* Burton, 17 Gratt. (Va.) 312, 318, *supra*, where the state is involved, though the facts do not necessitate the presumptions being treated conclusively, the court says: "I think now we might go further and adopt this presumption as a conclusion of law, and engraft it as a canon of the law of real property." And again in Crooker *v.* Pendleton, 23 Me. 339, 342, *supra*, the court, though treating the presumption as a true one, is led into saying: "The presumption is bottomed upon the same principle as the statute of limitations and is analogous to it."

[1] State *ex rel.* Brislawn *v.* Meath, 147 Pac. 11; State *ex rel.* Blakeslee *v.* Clausen, 148 Pac. 28; State *ex rel.* Case *v.* Howell, 147 Pac. 1159; State *ex rel.* Case *v.* Howell, 147 Pac. 1162.

[2] WASH. CONST., Art. II, § 1 (*b*). "The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law or any part thereof passed by the legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions, . . . "

[3] McClure *v.* Nye, 22 Cal. App. 248, 133 Pac. 1145. See Attorney-General *ex rel.* Barbour *v.* Lindsay, 178 Mich. 524, 145 N. W. 98, *accord*. Kadderly *v.* Portland, 44 Ore. 118, 74 Pac. 710, 75 Pac. 222; Bennett Trust Co. *v.* Sengstacken, 58 Ore. 333, 113 Pac. 863. *Contra*, State *ex rel.* Lavin *v.* Bacon, 14 S. D. 394, 85 N. W. 605. See also State *ex rel.* Arkansas Tax Commissioners *v.* Moore, 145 S. W. 199, 202, *contra*.